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No. 89-641

In The

Supreme Court of the United States

October Term, 1989

RICHARD GARNETT, ET AL.,

Petitioners,

v.

RENTON SCHOOL DISTRICT NO. 403, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the First Amendment or the Equal Access Act (20 U.S.C. § 4071 *et seq.*) ("EAA"), public high school officials are required to officially sanction and formally authorize a student-organized religious club to meet on school premises during noninstructional time where the avowed purpose of that club is to pray, read and discuss the Bible and share religious beliefs and where all other student groups at the school are curriculum-related.

2. Whether the EAA unconstitutionally violates the Establishment Clause by requiring secondary public schools to allow students to hold religious meetings on the school campus during or at times closely associated with the school day.

3. Whether, under Articles I (Section 11) and IX (Section 4) of the Washington Constitution, public high school officials are required to refuse to officially sanction and formally authorize a student-organized religious club to hold religious meetings on the school campus during or at times closely associated with the school day.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Defendants-Respondents ("Defendants") refused to allow the religious club of Plaintiffs-Petitioners ("Plaintiffs") to meet on the premises of Lindbergh High School ("LHS") with the official sanction and formal authorization of the Board of Directors ("the Board") of Renton School District No. 403 ("the School District"). The avowed purpose of Plaintiffs' religious club is to pray,

read and discuss the Bible and share religious beliefs. (C.R. 1, 41)[1]

The School District is a government entity that receives federal financial assistance and is managed by the Board and the District Superintendent. (C.R. 1, 41) The School District oversees the operation of LHS, a public secondary school in Renton, Washington. (E.R. 3)[2]

Following Congress' enactment of the EAA, the Board adopted Policy 6470 (E.R. 128) with the advice of a Citizens Advisory Committee. (Kohlwes depo. pp. 32, 36-37)[3] Policy 6470 sets forth guidelines or "criteria" that are used by the Board to determine whether to approve co-curricular activities. (Bumgarner depo. p. 15; Kohlwes depo. p. 37) Policy 6470 provides in pertinent part:

> The criteria to be used for approving co-curricular activities should include but not be limited to:
>
> 1. the purposes and/or objectives shall be an extension of a specific program or course offering,
>
> 2. the activity shall be acceptable to the community,

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[1] References to "C.R." are to the Clerk's Record in the District Court.

[2] References to "E.R." are to the Excerpt of Record filed with the Court of Appeals.

[3] Deposition transcripts are included in the Record in this matter pursuant to Stipulation. (C.R. 90; see also Clerk's Record entry "**" of January 25, 1988) However, because those depositions were not given separate numbers, they will be referred to by the name of the deponent.

> 3. the activity shall have carry-over values for lifetime activities,
>
> 4. the group shall be supervised by a qualified employee,
>
> 5. the cost of the activity must not be prohibitive to student or District,
>
> 6. the activity must comply with Title IX requirements,
>
> 7. the activity must take place on school premises unless approved in advance by the school principal, and
>
> 8. the activity must not be secretive in nature.

[E.R. 128; Plaintiffs' Appendix ("Pet. App.") 5a-6a] Policy 6470 also states that the District "does not offer a limited open forum." (*Id.*)

Pursuant to Policy 6470, Defendants provide LHS students the opportunity to meet as officially recognized and formally authorized student clubs. Those clubs may freely use school facilities and meet on school premises during noninstructional time – before or after actual classroom instruction. (E.R. 3) Pursuant to Policy 6470, each club or group must be supervised by a School District employee.[4] In order to meet as an officially

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[4] Each club or group has an assigned faculty advisor who periodically may lead the activities of the club. Those advisors may specifically perform instruction during group meetings. The advisor evaluates participation in club activities to determine whether a student should continue participating in a club. On any given day, a faculty advisor could assume a leadership position in any of the clubs. The advisors consult with the students in setting the agenda for the clubs. (Barker depo. pp. 45, 47-48, 54, 56)

recognized and formally authorized student group or club, it must either be listed on the School District's Master List of Clubs, Activities and Trips (the "Master List") (E.R. 88-92, 128) or be given interim approval to meet by the Superintendent, subject to the Board's decision whether to add the group or club to the Master List.[5]

The primary objective of Policy 6470 is to provide students "a broad offering of purposeful learning experiences" (E.R. 128) in order to achieve broad learning objectives. (Kohlwes depo. pp. 32, 36-37) Policy 6470 allows the Board to identify and approve "those activities which are consistent with the [School] District's curricular objectives" but are not formal classroom instruction activities. (E.R. 128)

Another objective of Policy 6470 is to develop students' character, democratic growth and understanding of others. (Barker depo. p. 20) Those broad student learning objectives, and the co-curricular activities designed to achieve them, are part of the actual secondary school curriculum in that there is a direct relationship between participation and such co-curriculum activities in classroom performance. Indeed, students involved in co-curricular activities have consistently demonstrated a tendency to do better in school. (Bumgarner depo. pp. 6, 11, 15; E.R. 18)

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[5] Of the 48 clubs and activities on the 1986-1987 Master List (E.R. 88-92), Plaintiffs challenge 15 as "noncurriculum-related groups." (E.R. 17) Both the District Court and the Court of Appeals, however, ruled that all 15 of the challenged clubs are related to the LHS curriculum and therefore cannot be considered "noncurriculum-related" under the EAA. (Pet. App. 15a-16a, 24a)

Plaintiffs are members or former members of a student religious club initially known as "Club Action" and later called "High-Tops." Plaintiffs applied to the School District for permission to meet on the LHS campus as an officially recognized and formally authorized club. (C.R. 1, 41) Their avowed purpose is to pray, read and discuss the Bible and share religious beliefs. (*Id.*) Pursuant to Policy 6470, the School District denied that request because the club was not curriculum-related and also because the club meetings would violate the Establishment Clause and also Articles I (Section 11) and IX (Section 4) of the Washington Constitution. (E.R. 4, 14)

Plaintiffs filed a lawsuit in the United States District Court for declaratory and injunctive relief to compel Defendants to allow Plaintiffs' club to meet on LHS premises. The District Court consolidated argument on Plaintiffs' Motion for Preliminary Injunction with trial on the merits. (C.R. 70) The District Court denied Plaintiffs' Motion, dismissed Plaintiffs' claim under the EAA and found that none of the challenged clubs are "noncurriculum-related." (Pet. App. 20a-38a) Because the mandatory provisions of the EAA had not been triggered, the Court did not address the constitutionality of the EAA. (*Id.* at 22a, 35a) The District Court also rejected Plaintiffs' constitutional arguments and ruled that, had Defendants allowed Plaintiffs' religious club to meet, Defendants would have violated the Establishment Clause and also Articles I (Section 11) and IX (Section 4) of the Washington Constitution. (*Id.* at 30a-37a)

The Court of Appeals affirmed the Judgment of the District Court and ruled that, had Defendants allowed Plaintiffs' religious club to meet on the LHS campus

Defendants would have violated the second and third prongs of the three-part Establishment Clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in that such permission would have the primary effect of advancing religion and would impermissibly entangle church and state. (Pet. App. 8a-12a)

The Court of Appeals also rejected Plaintiffs' challenge under the Free Speech Clause of the First Amendment. (*Id.* at 12a-14a) The Court of Appeals ruled that because LHS is not a "limited public forum," Defendants may limit student expression in any reasonable way and that Policy 6470 is not unreasonable on its face nor were Defendants "disingenuous" in its application. (*Id.* at 12a-13a) In addition, the Court of Appeals ruled that, because of the Establishment Clause constraints, Defendants were required to refuse to allow Plaintiffs' religious club to meet. (*Id.* at 13a)

The Court of Appeals also distinguished *Widmar v. Vincent*, 454 U.S. 263 (1981) (where a religious group was allowed to meet on the campus of a college that allowed a diverse range of student groups to meet) because of "the impressionability of young [high school] students, compulsory attendance laws that make [high school] students a captive audience, and the role of public schools in inculcating democratic ideals." (Pet. App. 10a-11a, 13a)

Based on its independent review of the Record, the Court of Appeals further ruled that the EAA does not apply because LHS did not provide a "limited open forum." (*Id.* at 14a-16a) The Court of Appeals ruled that all of the challenged clubs at LHS "are related to the school's curriculum." (*Id.* at 15a) The Court of Appeals

recognized that the challenged clubs "are supervised by faculty advisors and are so closely related to course work or are so integral a part of the traditional and official school programs that they could not reasonably be termed 'noncurriculum related.' " (*Id.* at 15a-16a) The Court of Appeals also ruled that LHS and the District "had considered instructional goals and, in accordance with a written policy, made the [challenged] clubs a part of [LHS's] curriculum." (*Id.* at 16a)

ARGUMENT

Defendants were required by the Establishment Clause and also by the Washington Constitution to deny Plaintiffs' religious club permission to meet in a classroom at LHS at a time closely associated with the school day. The EAA does not apply to this matter in that all school clubs challenged by Plaintiffs are "curriculum-related." Moreover, the EAA is unconstitutional under the Establishment Clause.

The decisions of the District Court and Court of Appeals in this matter are correct for the following reasons:

1. The Establishment Clause prohibited Defendants from authorizing Plaintiffs' religious club to meet at LHS. The clear mandate of the Establishment Clause outweighed Plaintiffs' limited free speech rights at the closed forum at LHS and required that Defendants deny permission for Plaintiffs' religious club to meet on campus.

2. The Court of Appeals correctly ruled that, because Defendants maintain a "closed forum" at LHS, neither the EAA nor the Free Speech Clause required Defendants to authorize Plaintiffs' religious club to meet at LHS. Defendants' decision also was compelled by the Washington Constitution. Moreover, even if the EAA were to apply in this matter, it is unconstitutional under the Establishment Clause.

Each of those reasons will now be discussed.

1. Under the Establishment Clause, Plaintiffs' constitutional rights were not violated.

This matter involves Defendants' refusal to officially sanction and formally authorize Plaintiffs' religious club and Defendants' attendant denial of permission for Plaintiffs' club to meet on school premises with a faculty advisor in attendance at times closely associated with the school day in order to pray, read and discuss the Bible and share religious beliefs. Thus, this matter involves a student request for official sponsorship and active promotion of religious student expression. As correctly recognized by the Court of Appeals, but ignored by Plaintiffs, in this context Plaintiffs' limited free speech rights have to be balanced against the mandate of the Establishment Clause requiring avoidance of official sponsorship and advancement of religion. (Pet. App. 7a-14a)

In balancing these competing constitutional interests, the Court of Appeals correctly concluded that the mandate of the Establishment Clause prohibits the sanctioning of Plaintiffs' religious club. The Court of Appeals

recognized the special characteristics of the public secondary school environment that require vigilance in avoiding the injection of religion into those schools – compulsory attendance laws, the role of public schools in inculcating democratic ideals into students and, most significantly, the impressionability of public secondary school students.[6]

Because of this unique role played by public education in our society, this Court has consistently disallowed the divisive influence of religion in public secondary schools. *See, e.g., Edwards v. Aquillard,* 482 U.S. 578 (1987); *Wallace v. Jaffree,* 472 U.S. 38 (1985); *Stone v. Graham,* 449 U.S. 39 (1980); *Abington School District v. Schempp,* 374 U.S. 203 (1963); *Engel v. Vitale,* 370 U.S. 421 (1962).

This Court has repeatedly recognized the vast differences between a high school and a university. *See Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 98 L. Ed. 2d 592, 602-03 (1988); *Edwards v. Aquillard, supra,* 482 U.S. at 583-85; *Widmar v. Vincent, supra.* While this Court in *Widmar, supra,* held that a religious group was allowed to meet on the campus of a college that allowed a diverse range of student groups to meet, the students were adults rather than impressionable high school students. This Court has repeatedly recognized that the impressionability of secondary school students is a crucial factor when applying the Establishment Clause prohibition against the advancement of religion in public secondary

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[6] The Court of Appeals also correctly ruled that LHS "is not a First Amendment limited public forum." (Pet. App. 12a)

schools. *Edwards v. Aquillard, supra,* 482 U.S. at 583-85; *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 683 (1986); *Widmar v. Vincent, supra,* 454 U.S. at 274 n. 14; *Tilton v. Richardson,* 403 U.S. 672, 685-86 (1971). Accordingly, the Court of Appeals correctly ruled that "the impressionability of young students" is a crucial factor in this matter. (Pet. App. 10a-11a)

The Court of Appeals correctly recognized that, "[w]hen the explicit Establishment Clause proscription against prayer in the public schools is considered, the protections of political and religious speech are inapposite." (Pet. App. 13a) Indeed, with only one exception, every federal appellate court that has examined similar religious group access claims in public secondary or elementary schools has held that the school district's Establishment Clause concerns outweigh a plaintiff's free speech concerns and that, therefore, access is prohibited.[7]

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[7] *See Bell v. Little Axe Independent School Dist. No. 70,* 766 F.2d 1391 (10th Cir. 1985); *Nartowicz v. Clayton County School Dist.,* 741 F.2d 538 (3rd Cir. 1984), *vacated on other grounds* 475 U.S. 534 (1986); *Lubbock Civ. Lib. Union v. Lubbock Ind. Sch. Dist.,* 669 F.2d 1038 (5th Cir. 1982); *cert. den.* 459 U.S. 1159 (1983); *Collins v. Chandler Unified School Dist.,* 644 F.2d 759 (9th Cir.), *cert. den.* 454 U.S. 863 (1981); *Brandon v. Board of Ed. of Guilderland Cent. Sch.,* 635 F.2d 971 (2nd Cir. 1980); *see generally Jager v. Douglas County School Dist.,* 862 F.2d 824 (11th Cir.), *cert. den.* 109 S. Ct. 2431 (1989); *but see Mergens v. Board of Educ. of Westside Com. Schools,* 867

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Plaintiffs' arguments are flawed in that the Record clearly establishes that Plaintiffs are seeking the sponsorship of the School District. Plaintiffs are requesting the use of school facilities for regularly scheduled religious activities at a time closely associated with the school day. The meetings of Plaintiffs' religious club would have to be attended by a School District employee. Plaintiffs are seeking the official label of a formally authorized club. Indeed, the Court of Appeals correctly ruled in this matter that Defendants did not prohibit Plaintiffs "from discussing religion at school." (Pet. App. 14a) There is not a scintilla of evidence that Defendants *ever* discouraged Plaintiffs from sharing their religious faith with other students or discouraged anyone from attending or being involved in Plaintiffs' religious club. Defendants merely refused to officially authorize Plaintiffs' religious club or allow the club to formally use school facilities such that

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F.2d 1076 (8th Cir. 1989), *cert. granted* 109 S. Ct. 3240 (1989) [*Mergens* is similar to this matter in that public secondary school students were seeking the approval of the school district to meet as a religious group. The Court of Appeals ruled on the facts presented there (despite citing the decision of the Court of Appeals in this matter) that the school district allowed "noncurriculum-related" clubs to meet on the campus. Therefore, the Court ruled that the EAA applied and forbade discrimination against the students' proposed club on the basis of the club's religious nature. The "curriculum-relatedness" of a student group is essentially a factual inquiry that must be made on a case-by-case basis. Thus, the Court's conclusion in *Mergens* regarding the EAA is not instructive to this matter. In this matter, the Court of Appeals correctly ruled, after independently reviewing the Record, that all of the challenged clubs are "curriculum-related." (Pet. App. 14a-16a)].

students, parents or the public would perceive that Plaintiffs' religious club had the imprimatur of the School District.

Thus, Plaintiffs are clearly seeking school sponsorship for their religious activities. That is why the District Court and Court of Appeals correctly ruled that the Establishment Clause prohibits Defendants from sanctioning Plaintiffs' religious club.

2. The Court of Appeals correctly ruled that, because Defendants maintain a "closed forum" at LHS, neither the EAA nor the Free Speech Clause required Defendants to authorize Plaintiffs' religious club to meet at LHS. Defendants' decision also was compelled by the Washington Constitution. Moreover, even if the EAA were to apply in this matter, it is unconstitutional under the Establishment Clause.

The Court of Appeals correctly ruled that, because Defendants maintain a "closed forum" at LHS, neither the EAA nor the Free Speech Clause required Defendants to authorize Plaintiffs' religious club to meet at LHS. (Pet. App. 12a-16a) That ruling was based on the Court's thorough review of the language and legislative history of the EAA, Policy 6470 in its entirety and an independent review of the Record.

The crucial issue under the EAA is whether Defendants allowed "noncurriculum-related" student groups to use school facilities such that LHS became a "limited open forum" under the EAA. The corollary and related issue under the First Amendment is whether Defendants,

by "policy or practice," opened LHS to indiscriminate use.[8]

Of approximately 50 clubs on the School District's Master List of approved and authorized student clubs, Plaintiffs challenged 15 and contended that those 15 clubs are "noncurriculum-related." The Court of Appeals, as did the District Court, correctly ruled that all of the challenged clubs at LHS "are an extension of the courses and programs of the [D]istrict" and "are supervised by faculty advisers and are so closely related to course work or are so integral a part of the traditional and official school programs" that Defendants retained a "closed forum" at LHS. (Pet. App. 13a, 15a-16a)

In reaching that conclusion, the Court of Appeals first analyzed Policy 6470. Examining the entire Policy, the Court correctly ruled that the Policy is not unreasonable on its face nor are Defendants "disingenuous" in applying it. (*Id.* at 13a) All of the 15 clubs challenged by Plaintiffs are extensions of curricular courses and programs at LHS, while Plaintiffs' religious club is not. The Court of Appeals correctly concluded that in authorizing the challenged clubs, Defendants considered instructional goals and, in accordance with the written Policy, specifically made those clubs a part of the curriculum

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[8] In *Hazelwood School District v. Kuhlmeier, supra,* 98 L. Ed. 2d at 602-04, this Court held that a "public forum" in a high school is created *only if* school authorities by "policy or practice" open school facilities for "indiscriminate use" and there must be a finding of a "clear intent to create a public forum." There clearly is no such policy or practice by the School District in this matter.

at LHS. (*Id.* at 15a-16a) Therefore, Defendants correctly denied authorization for Plaintiffs' religious club to meet, as the District Court and Court of Appeals held.

In concluding that none of the challenged clubs are "noncurriculum-related" – a term that is not defined in the EAA – the Court of Appeals also examined the legislative history of the EAA and correctly ruled that Congress did not intend to depart from the traditional notion that school districts retain broad discretion and authority to define their curriculum. (Pet. App. 15a) However, the Court correctly concluded that it could not completely defer to Defendants' determination. Thus, the Court independently reviewed the Record and correctly ruled that "all clubs at [LHS] are related to [LHS's] curriculum." (*Id.*) Therefore, the Court correctly concluded that the EAA does not apply to this matter.

Even if a "limited open forum" was somehow created by Defendants at LHS, the EAA cannot compel Defendants to allow Plaintiffs' religious club to meet on school premises in violation of the Washington Constitution, as the District Court correctly ruled.[9]

The District Court ruled that "[t]he mandatory provisions of the EAA may not be applied in Washington State to permit religious organizations to meet on school

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[9] This issue was raised and briefed by Defendants in their Appellees' Brief filed with the Court of Appeals (at 23-29). However, because the Court of Appeals ruled that the EAA did not apply, it did not reach that issue.

premises owing to provisions of this state's constitution[10] and relevant case law construing their application." (Pet. App. 31a) The District Court held that the Washington Constitution "requires a far stricter separation of church and state than the federal constitution" (*id.*), and correctly concluded:

> Even if [LHS] had created a 'limited open forum,' and even with the neutral operation of the EAA allowing students to meet on school premises but without school sponsorship, under Washington's constitutional law such meetings would (1) tend to introduce sectarian influence into [LHS] and (2) would result in an impermissible appropriation of public money or property for a religious purpose. The EAA itself provides that a state need not break its own laws in order to observe EAA requirements.

(*Id.* at 37a)

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[10] The District Court correctly ruled that if Plaintiffs were granted their requested relief, Defendants would be compelled to violate two distinct provisions of the Washington Constitution – Article I, Section 11, and Article IX, Section 4.

Article I, Section 11, provides in pertinent part: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." That ban on the use of public funds for religious purposes is, as the District Court noted, "absolute and without exception." (Pet. App. 33a) *See Perry v. School District No. 81*, 54 Wn.2d 886, 344 P.2d 1036 (1959); *State Ex. Rel. Dearle v. Frazier*, 102 Wn. 369, 173 P. 35 (1918).

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The District Court correctly concluded that the "EAA does not require the Renton School District to permit an unconstitutional use of school property." (*Id.* at 34a) In reaching that conclusion, the Court looked to the language of the EAA, which provides in pertinent part that "[n]othing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof . . . to sanction meetings that are otherwise unlawful [or] . . . to abridge the constitutional rights of any person." 20 U.S.C. § 4071 (d) (5) and (7).

Congress, in considering equal access proposals, surely was aware of the provisions of the Washington Constitution that mandate absolute separation between government and religion. Several months before passage of the EAA, Senator Gorton of Washington drew upon his knowledge of the Washington Constitution to convince his colleagues of the importance of respecting states' rights and state constitutional provisions when considering passage of a constitutional amendment that would have required equal access. Specifically, he stated that "nothing in [the amendment] . . . would undermine those

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Article IX, Section 4, provides: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." As noted by the District Court (Pet. App. 31a-32a), the Washington Supreme Court has construed that constitutional provision as an express and absolute prohibition of the allowance of *any* sectarian influence in public schools. *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973, 978 (1973).

State constitutional provisions." 130 Cong. Rec. S2883 (Daily ed. March 20, 1984).

Accordingly, the plain language of the EAA makes it clear, as the District Court correctly concluded (Pet. App. 34a-35a), that Congress did not intend to preempt the Washington Constitution. The District Court correctly ruled that "[t]he conclusion is unavoidable that if Plaintiffs were to obtain their requested relief, the meetings of their religious club on school premises would amount to at least a slight benefit to religion, a benefit that is prohibited by Washington's Constitution." (Pet. App. 34a)

Finally, the EAA unconstitutionally violates the Establishment Clause by requiring secondary public schools to allow students to hold religious meetings on the school campus during or at times closely associated with the school day.[11]

The Establishment Clause was intended to erect "a wall of separation between church and state" [*Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947)], a wall that "must be kept high and impregnable" [*Illinois v. Board of Education*, 333 U.S. 203, 212 (1947)]. In erecting that wall, the founders of the constitution recognized the wisdom of absolute separation between church and state – "complete separation between the state and religion is best for the state and best for religion." *Illinois v. Board of Education, supra*, 333 U.S. at 231-32; *see Zorach v. Clauson*, 343

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[11] While the constitutionality of the EAA was raised before the District Court and Court of Appeals, neither court addressed that issue because of the respective rulings by the courts that Defendants' conduct did not trigger application of the EAA. (Pet. App. 16a, 35a)

U.S. 306, 312 (1952); *Everson v. Board of Education, supra,* 330 U.S. at 26-27.

This Court's decisions[12] make it clear that the origin of religious activity – whether that activity is student or state-initiated – is irrelevant when determining whether an Establishment Clause violation has occurred. The crucial determination is the extent of government sponsorship or support of the activity.

Plaintiffs' constitutional analysis focuses primarily on whether Defendants violated Plaintiffs' free speech and free exercise rights and fails to balance those rights against the Establishment Clause proscription against government entanglement with religion. The crucial issue is whether the EAA, in requiring Defendants to allow Plaintiffs' religious club to meet at LHS, would violate the Establishment Clause.

When analyzed under the three-part test set forth in *Lemon v. Kurtzman, supra,* 403 U.S. at 612-13, the EAA is unconstitutional because (1) it has an impermissible religious purpose rather than a secular purpose, (2) its principal or primary effect advances religion, and (3) it fosters excessive government entanglement with religion.

In the coercive high school setting with compulsory attendance laws, a congressionally-mandated policy that allows students to engage in voluntary religious practices impermissibly creates the appearance to impressionable students that the state has placed its imprimatur on those

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[12] *See, e.g., Edwards v. Aquillard, supra; Wallace v. Jaffree, supra; Stone v. Graham, supra; Abington v. Schempp, supra; Engel v. Vitale, supra; Illinois v. Board of Education, supra.*

religious practices. Also, teacher or faculty monitoring, which is contemplated by the EAA and is required pursuant to Policy 6470, would excessively entangle government and religious affairs, as would the fact that, under Policy 6470, Defendants would have to recognize and place Plaintiffs' religious club on the Master List in order for the club to be allowed to meet.

CONCLUSION

This Court should deny Plaintiffs' Petition for Writ of Certiorari in that the decision of the Court of Appeals is correct for the reasons discussed above.

Defendants, however, acknowledge that this case presents issues substantially similar to those presented in *Mergens v. Board of Educ., supra*, in which this Court has granted certiorari [109 S.Ct. 3240 (1989) (No. 88-1597)]. Therefore, if this Court grants certiorari in this matter, Defendants request that this Court accept briefs on the merits. There are issues and arguments (*e.g.*, the impressionability of high school students, the applicability of the Washington Constitution and the unconstitutionality of the EAA) that have not been raised or discussed in *Mergens*. Also, if this Court grants certiorari, this Court should hear oral argument in this matter at the same time that it hears the oral argument in *Mergens*.

Respectfully submitted,

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